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U.S. Citizenship and Immigration Services

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DEC 15 2006

FILE: [redacted] Office: VERMONT SERVICE CENTER Date:
EAC 05 158 52049

IN RE: **Petitioner:** [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Director, Vermont Service Center, denied the employment-based immigrant visa petition, which is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner seeks classification pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2), as a member of the professions holding an advanced degree. The petitioner seeks employment as a product design engineer. The petitioner asserts that an exemption from the requirement of a job offer, and thus of an alien employment certification, is in the national interest of the United States. The director found that the petitioner qualifies for classification as a member of the professions holding an advanced degree, but that the petitioner had not established that an exemption from the requirement of a job offer would be in the national interest of the United States.

On appeal, counsel submits a brief, a manuscript by the petitioner and evidence of a conference presentation that postdates the filing of the petition. For the reasons discussed below, the petitioner has not demonstrated that a waiver of the alien employment certification is in the national interest. Our conclusion that the national interest in this matter could be served through the alien employment certification process is reinforced by the fact that petitioner's employer has, in fact, obtained an alien employment certification in behalf of the petitioner in less than one month and that this certification is the basis of another approved immigrant visa petition in the petitioner's behalf.

Section 203(b) of the Act states in pertinent part that:

> (2) Aliens Who Are Members of the Professions Holding Advanced Degrees or Aliens of Exceptional Ability. --
>
> > (A) In General. -- Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.
> >
> > (B) Waiver of Job Offer.
> >
> > > (i) . . . the Attorney General may, when the Attorney General deems it to be in the national interest, waive the requirement of subparagraph (A) that an alien's services in the sciences, arts, professions, or business be sought by an employer in the United States.

The petitioner holds a Ph.D. in engineering from the State University of New York (SUNY), Stony Brook. The petitioner's occupation falls within the pertinent regulatory definition of a profession. The petitioner thus qualifies as a member of the professions holding an advanced degree. The remaining

issue is whether the petitioner has established that a waiver of the job offer requirement, and thus an alien employment certification, is in the national interest.

Neither the statute nor pertinent regulations define the term "national interest." Additionally, Congress did not provide a specific definition of "in the national interest." The Committee on the Judiciary merely noted in its report to the Senate that the committee had "focused on national interest by increasing the number and proportion of visas for immigrants who would benefit the United States economically and otherwise. . . ." S. Rep. No. 55, 101st Cong., 1st Sess., 11 (1989).

Supplementary information to the regulations implementing the Immigration Act of 1990 (IMMACT), published at 56 Fed. Reg. 60897, 60900 (November 29, 1991), states:

> The Service believes it appropriate to leave the application of this test as flexible as possible, although clearly an alien seeking to meet the [national interest] standard must make a showing significantly above that necessary to prove the "prospective national benefit" [required of aliens seeking to qualify as "exceptional."] The burden will rest with the alien to establish that exemption from, or waiver of, the job offer will be in the national interest. Each case is to be judged on its own merits.

Counsel attempts to rely on a non-precedent decision issued by this office. Such decisions are not binding on us. 8 C.F.R. § 103.3(c). Any usefulness that decision may have had was eliminated in 1998 when this office issued a precedent decision relating to waivers of the alien employment certification in the national interest. *Matter of New York State Dep't. of Transp.*, 22 I&N Dec. 215 (Comm. 1998), has set forth several factors which must be considered when evaluating a request for a national interest waiver. First, it must be shown that the alien seeks employment in an area of substantial intrinsic merit. Next, it must be shown that the proposed benefit will be national in scope. Finally, the petitioner seeking the waiver must establish that the alien will serve the national interest to a substantially greater degree than would an available U.S. worker having the same minimum qualifications.

It must be noted that, while the national interest waiver hinges on *prospective* national benefit, it clearly must be established that the alien's past record justifies projections of future benefit to the national interest. The petitioner's subjective assurance that the alien will, in the future, serve the national interest cannot suffice to establish prospective national benefit. The inclusion of the term "prospective" is used here to require future contributions by the alien, rather than to facilitate the entry of an alien with no demonstrable prior achievements, and whose benefit to the national interest would thus be entirely speculative.

We concur with the director that the petitioner works in an area of intrinsic merit, engineering. The director questioned with the proposed benefits of the petitioner's work would be national in scope. We find that it would. As of the date of filing, the petitioner was in charge of end-of-car products at Strato, a manufacturer of quality railroad products that is certified by the American Association of Railroads (AAR). [redacted], the Chief Executive Officer and President of Strato, explains:

> As a major player in the supply of railroad products, Strato constantly proposes to the AAR and facilitates the promulgation of new standards for the entire industry.

The petitioner has worked on proposals to enhance the safety and efficiency of the railroad's operation. [redacted] further asserts that Strato parts "have been installed on over 1.6 million railcars running in North America." *Matter of New York State Dep't of Transp.*, 22 I&N Dec. at 217, found that engineering of bridges was national in scope because New York's bridges connect to the national transportation system and the maintenance of bridges and roads connecting to this system was national in scope. We find that designing parts for 1.6 million railcars and contributing to national railroad standards are benefits that are national in scope. Thus, we withdraw the director's contrary finding on this issue.

It remains, then, to determine whether the petitioner will benefit the national interest to a greater extent than an available U.S. worker with the same minimum qualifications. Eligibility for the waiver must rest with the alien's own qualifications rather than with the position sought. In other words, we generally do not accept the argument that a given project is so important that any alien qualified to work on this project must also qualify for a national interest waiver. *Matter of New York State Dep't of Transp.*, 22 I&N Dec. at 218. Moreover, it cannot suffice to state that the alien possesses useful skills, or a "unique background." Special or unusual knowledge or training does not inherently meet the national interest threshold. The issue of whether similarly-trained workers are available in the United States is an issue under the jurisdiction of the Department of Labor. *Id.* at 221.

At issue is whether this petitioner's contributions in the field are of such unusual significance that the petitioner merits the special benefit of a national interest waiver, over and above the visa classification she seeks. By seeking an extra benefit, the petitioner assumes an extra burden of proof. A petitioner must demonstrate a past history of achievement with some degree of influence on the field as a whole. *Id.* at 219, n. 6. In evaluating the petitioner's achievements, we note that original innovation, such as demonstrated by a patent, is insufficient by itself. Whether the specific innovation serves the national interest must be decided on a case-by-case basis. *Id.* at 221, n. 7.

The petitioner earned his Ph.D. at SUNY Stony Brook in 2002 and then went to work for Strato. Dr. [redacted], the chair of the petitioner's doctoral thesis proposal and examination committees, asserts that the petitioner's student work was recognized in the machine design community through the publication of articles and his conference presentations. Of the articles submitted, however, only the 2003 article in the *Proceedings of DETC '03* bears any indication of publication. Regardless, the record lacks evidence of the influence of these articles, such as evidence that any of them have been cited by independent engineering teams.

[redacted], a member of the petitioner's reading committee for his graduate study at SUNY Stony Brook, praises the petitioner's knowledge of various software programs, his enthusiasm and his professionalism. Simple training in advanced technology or unusual knowledge, while perhaps

attractive to the prospective U.S. employer, does not inherently meet the national interest threshold. *Id.* at 221.

At Strato, the petitioner was, at the time of filing, in charge of their end-of-car products. According to [redacted], the petitioner was assigned to a simulation project for a major customer, TTX, who was so satisfied with the result that TTX took Strato's proposal to the AAR. [redacted] further asserts that the petitioner worked on a technical innovation to enhance the safety and efficiency of railroad operations, which was adopted by the AAR.

[redacted], Director of Engineering at Strato, explains that the petitioner simulated the movements, degrees of freedom and mechanical forces for the brake hose arrangement for a specific freight car that led to a general fix in the industry, reducing incidences of brake line un-couplings. Strato's project on simulating and testing forces on brake hoses is funded by the AAR. Finally, [redacted] asserts that TTX has sent an engineer to work with the petitioner on a simulation of brake systems.

Vice President of Strato, describes the collaboration with TTX in more detail. According to TTX contracted Strato to design a special pipe assembly for renovating the brake system on a rail car. The petitioner designed the assembly, conducted simulations with TTX, including new simulations to accommodate TTX's "new thoughts" on the petitioner's pipe assembly. TTX ultimately adopted the new system.

In response to the director's request for additional evidence, the petitioner submitted letters from two members of AAR's Brake Systems Committee and a senior engineer at TTX. The committee members indicate how impressed they were with the petitioner's test device and indicate that AAR adopted three of the petitioner's safety-related specifications as mandatory industry standards for all new freight cars. [redacted], one of the committee members, asserts that it is "not common for a team to come up with three well-received propositions in such a short period of time." [redacted] a senior engineer with TTX, asserts that the petitioner's test device for break hoses is highly accurate, readily applicable, and has "helped us to have a more thorough understanding of the mechanism during the dynamic motion."

The director concluded that the letters were all from the petitioner's close colleagues and that the petitioner had not demonstrated the impact of his articles. On appeal, counsel quotes from all of the letters submitted and asserts that they come from witnesses both within and outside of the petitioner's immediate circle of colleagues.

Citizenship and Immigration Services (CIS) may, in its discretion, use as advisory opinions statements submitted as expert testimony. *See Matter of Caron International*, 19 I&N Dec. 791, 795 (Comm. 1988). However, CIS is ultimately responsible for making the final determination regarding an alien's eligibility for the benefit sought. *Id.* The submission of letters from experts supporting the petition is not presumptive evidence of eligibility; CIS may evaluate the content of those letters as to whether they support the alien's eligibility. *See id.* at 795-796. CIS may even give less weight to an

opinion that is not corroborated, in accord with other information or is in any way questionable. *Id.* at 795; *See also Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

The petitioner contributions to national AAR standards are notable. As stated by [redacted] however, the petitioner was working on a project funded by AAR. The adoption of his proposals indicates that he successfully performed his assigned duties. While [redacted] asserts that it is not "common" for three proposals to be adopted after such a short period of time, he does not indicate how many projects AAR funds, how many proposals it reviews as a result of these funded projects and how many it ultimately adopts. The record does not contain the final standards crediting the petitioner or coverage in the general or trade media remarking on the significance of the new standards. Thus, the petitioner has not established the significance of AAR's adoption of his proposed standards.

The manuscript submitted on appeal bears no evidence of publication. The conference presentation submitted on appeal postdates the filing of the petition. The petitioner must establish eligibility as of that date. *See* 8 C.F.R. § 103.2(b)(12); *Matter of Katigbak,* 14 I&N Dec. 45, 49 (Reg. Comm. 1971).

The record shows that the petitioner is respected by his colleagues and has made useful contributions in his field of endeavor. It can be argued, however, that most engineering research, in order to receive funding, must present some benefit to the general pool of scientific knowledge. It does not follow that every researcher working on a nationally funded project inherently serves the national interest to an extent that justifies a waiver of the job offer requirement.

Most significantly, nothing in the legislative history suggests that the national interest waiver was intended simply as a means for employers (or self-petitioning aliens) to avoid the inconvenience of the alien employment certification process. *Matter of New York State Dept. of Transportation,* 22 I&N Dec. at 223. Neither the petitioner nor counsel has ever attempted to explain in this proceeding why the alien employment certification process could not serve the national interest in this matter. In fact, on July 10, 2006, Strato applied for an alien employment certification, which the Department of Labor certified on August 8, 2006. Thus, the petitioner now meets the requirement this petition asks us to waive. Further, on August 23, 2005, Strato filed an immigrant visa petition in behalf of the petitioner, receipt number SRC-06-257-50618. The director, Texas Service Center, approved that petition on September 28, 2006. Strato's ability to obtain an alien employment certification and an approved petition in behalf of the petitioner reinforces our position that the national interest could be served through that process, which, therefore, need not be waived in order to serve the national interest.

As is clear from a plain reading of the statute, it was not the intent of Congress that every person qualified to engage in a profession in the United States should be exempt from the requirement of a job offer based on national interest. Likewise, it does not appear to have been the intent of Congress to grant national interest waivers on the basis of the overall importance of a given profession, rather than

on the merits of the individual alien. On the basis of the evidence submitted, the petitioner has not established that a waiver of the requirement of an approved alien employment certification will be in the national interest of the United States.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden.

This denial is without prejudice to the filing of a new petition by a United States employer accompanied by an alien employment certification certified by the Department of Labor, appropriate supporting evidence and fee.

ORDER: The appeal is dismissed.